

SERVICE DATE – LATE RELEASE NOVEMBER 23, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34536

INDIANA & OHIO CENTRAL RAILROAD, INC.–ACQUISITION
AND OPERATION EXEMPTION–CSX TRANSPORTATION, INC.

Decided: November 23, 2004

On September 1, 2004, the Indiana & Ohio Central Railroad, Inc. (IOCR), a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to operate under a lease from CSX Transportation, Inc. (CSXT) approximately 107 miles of rail line consisting of the Cincinnati Terminal Subdivision, between NA Tower, OH, milepost BB 7.5, and Oakley, OH, milepost BB 12.4, and the Midland Subdivision, between Oakley, milepost BB 12.4, and Columbus, OH, milepost BR 114.6. Notice of the exemption was served and published in the Federal Register (69 FR 58999) on October 1, 2004.

On September 13, 2004, the Brotherhood of Locomotive Engineers & Trainmen (BLET) filed a protest to the exemption notice. On September 15, 2004, the United Transportation Union (UTU or petitioner) filed a petition to revoke the exemption, and UTU filed an amended petition to revoke on September 24, 2004. On October 1, 2004, IORC replied to BLET's protest and UTU's petition to revoke.

BLET's protest and UTU's petition to revoke raise issues that require further consideration by the Board. By this decision, the Board is instituting a proceeding under 49 U.S.C. 10502(d) to consider these filings.

UTU's amended petition to revoke seeks discovery from IORC under 49 CFR 1121 and 1114 to obtain all leases and other written arrangements between IORC and CSXT that relate to the transaction described in IORC's notice of exemption. UTU claims that it requested discovery when it learned about certain information after it filed its initial petition to revoke.

IORC opposes UTU's discovery request, asserting that UTU waived its right to discovery because it did not submit its discovery request when it filed its initial petition to revoke, citing 49 CFR 1121.2 and Expedited Procedures for Processing Rail Rate, 1 S.T.B. 754, 772 (1996) (Expedited Procedures). IORC then has declined to provide UTU with the requested materials.

On November 5, 2004, UTU has now filed a motion to compel IORC to produce the materials it requested with its amended petition to revoke. It contends that it did not waive its right to discovery, arguing that the Board's procedures in 49 CFR 1121.4(f) do not prohibit a party from requesting discovery in a second petition to revoke in the same proceeding to obtain new information that was not available when the original petition was filed.

Responding to UTU's motion to compel in a letter filed November 15, 2004, IORC reiterates that UTU has failed to comply with the Board's procedures in filing its discovery request and also points out that UTU has late-filed its motion to compel. The carrier asserts further that the lease and purchase agreement is public, having been filed with the Securities and Exchange Commission. The carrier makes the general claim that any other transaction documents are not relevant or material to the petition to revoke, and are confidential business arrangements that would harm IORC and CSXT.

UTU's motion to compel will be granted. UTU submitted its discovery request shortly after it filed its original petition to revoke, based on information that was not known to it when it filed its original petition. The material sought through discovery is limited in scope, relevant to the issues raised by UTU, and appears to be readily available from the carrier. The production of the material should assure that petitioner has adequate information available to pursue its revocation request. The parties, of course, may seek a protective order for any confidential material to be provided in discovery.

Moreover, while parties always are urged to comply fully with the Board's rules, the provision relied upon by IORC at 49 CFR 1121.2 is intended in large part to allow a petitioner to conduct discovery expeditiously so that it may use the information produced to support the institution of a revocation proceeding under 49 U.S.C. 10502(d) within the 90-day period provided by the statute for the Board to decide whether to institute such a proceeding. See Expedited Procedures, 1 S.T.B. at 772. Here, the Board already has decided to institute such a proceeding. Thus, given all of the circumstances present in this case, the fact that UTU was a few days late in seeking discovery and filing its motion to compel does not warrant denying UTU the opportunity to conduct discovery in this proceeding.

To accommodate the pending discovery request, the following procedural schedule is set. Discovery must be completed within 10 days from the service date of this decision. UTU's supplement to its petition to revoke is due 25 days from the service date of this decision. IORC reply is due 40 days from the service date of this decision.

It is ordered:

1. Under 49 U.S.C. 10502(d), a proceeding is instituted to consider BLET's protest and UTU's petition to revoke.

2. UTU's motion to compel is granted.
3. Discovery must be completed by December 3, 2004.
4. UTU's supplement to its petition to revoke is due by December 20, 2004.
5. IORC's reply is due by January 3, 2005.
6. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary